

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA**

In re:

CASE NO. 04-15772-BKC-AJC

GARRY WAYNE CARTY,

Debtor.

ORDER SUSTAINING RENEWED OBJECTION AND DISALLOWING CLAIM #11

THIS CAUSE came before the Court for an evidentiary hearing on February 2, 2005 upon the Debtor's Renewed Objection to Claim 11 filed by eCAST Settlement Corporation ("eCAST" or "Claimant"). The Debtor seeks an order of the Court striking and disallowing eCAST's claim on the grounds that the Debtor did not sign any agreement with Claimant and Claimant was unable to produce sufficient documentation to support its Claim.

The Court heard the proffers and representations of the parties and considered all the evidence admitted. Based upon the foregoing, the Court enters this Order which shall constitute the Court's findings of fact and conclusions of law.

BACKGROUND

Garry Wayne Carty ("the Debtor") filed a voluntary petition under Chapter 13 of the Bankruptcy Code on June 18, 2004. In his Schedule F, the Debtor listed, among other debts, a disputed debt to Wachovia Bank in the amount of \$15,900.00, corresponding to an account number ending in 7155. This debt is the subject of the objection.

Creditor eCAST, as assignee of MBNA America Bank, N.A., timely filed a proof of claim in the case, Claim #11. (After Wachovia Bank's merger with First Union, the account was sold to MBNA America Bank, N.A.) The proof of claim referenced an account number ending in 9068.

In section 1 of the proof of claim, eCAST described the basis for its claim as “CREDIT CARD DEBT”. In section 4 of the proof of claim, eCAST indicated that the total amount of its claim, at the time the case was filed, was \$16,498.81. Notably, the check-box in section 4 of Claim #11, which indicates whether the claim includes interest or other charges in addition to the principal amount of the claim, was not checked. There were also no itemized statements attached indicating any interest or additional charges. The only attachment to the eCAST Claim was a single page containing a statement that read:

Claim Documentation

Statements documenting the balance of this account are currently unavailable, but will be provided through an amendment to this claim if they become available, or upon request by contacting claimant’s counsel at:

**Becket & Lee LLP
P.O. Bos 3001
Malvern, PA 19355
Phone: (610) 644-7800**

In section 8 of Claim #11, which does not correspond to the Official Form 10 for proofs of claim,¹ eCAST stated that itemized monthly statements of account were mailed to the Debtor pre-petition. The Claimant further stated that it maintains copies of said statements on microfilm or image processing and reproduction of same absent a dispute as to the balance would be unduly time consuming and burdensome; nevertheless, where an interested party so requests, Claimant stated it would search its records to provide copies of said monthly account statements. To request further documentation, the proof of claim indicated that the interested party should call Becket & Lee LLP

¹ Section 8, in the Official Form 10 governing proofs of claim, addresses the subject of credits with respect to claims.

at 1-800-962-6030 and ask to speak to the Claims Servicing Supervisor. Finally, Claim #11 indicated it *may* include contractual interest and/or late charges. (Emphasis added).

Section 9 of the Official Form addresses the subject of supporting documentation and states:

9. Supporting Documents: *Attach legible copies of supporting documents*, such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, court judgments, mortgages, security agreements, and evidence of perfection of lien. **DO NOT SEND ORIGINAL DOCUMENTS.** If the documents are not available, explain. If the documents are voluminous, attach a summary. Supporting documents should not exceed 5 pages **(See reverse for instructions)**

The instructions for section 9 require a creditor to attach to the proof of claim form copies of documents that show the Debtor owes the debt claimed or, if the documents are too lengthy, a summary of those documents. If documents are not available, the creditor is directed to attach an explanation of why they are not available.

On October 26, 2004, the Debtor filed an objection to Claim #11, stating the Claimant failed to attach any documentation in support of its claim that establishes Debtor's liability on this account. The Debtor recommended the claim be stricken and disallowed in its entirety.

On November 22, 2004, eCAST filed a response to Debtor's objection to its claim, asserting that support documentation in the form of Debtor's last monthly billing statement had been received, and that same had now been attached to an Amended Claim #11 filed with the Court. The amended claim was filed on Official Form 10. In the section labeled "Account or other number by which creditor identifies debtor", eCAST provided not only the 9068 account number that was reflected on the originally filed proof of claim, but also provided the 7155 account number which was listed by the Debtor in his Schedule F. Section 1 of the amended proof of claim still described the basis for the claimed debt as "CREDIT CARD DEBT", and the check-box in section 4 of the Amended

Claim was still not checked, suggesting the claim does not include interest or other charges in addition to the principal amount of the claim.

On December 6, 2004, the Debtor filed his Amended Renewed Objection to eCAST's amended Claim #11, reiterating the prior objection to Claimant's failure to attach sufficient documentation in support of its claim. In support of his Amended Renewed Objection to amended Claim #11, the Debtor filed an affidavit stating the subject account was opened by Debtor's deceased wife prior to her death; and, the Debtor never signed or otherwise agreed to be responsible for the charges on said account. The Debtor stated his deceased wife opened the account with Wachovia or its predecessor in interest.

On December 21, 2004, eCAST filed a response to the Amended Renewed Objection, arguing that the documentation attached to the amended proof of claim was sufficient to support its claim against the Debtor, and attached as Exhibit B to the Response additional documentation in the form of monthly billing statements dated March 2002 through June 2004, as well as copies of three (3) checks signed by Debtor with various dates in 2003 for payment on the account. The Response stated:

18. According to MBNA's records, the account was opened as a joint account with First Union in 1990. MBNA acquired Debtor's account from First Union in June 2001. The application for the account is no longer available due to the passage of time.... The fact that the actual account application is no longer available does not relieve the Debtor of the liability for the debt based on the evidence provided herewith, and the lack of any evidence produced by the Debtor showing that he made any attempt to "correct" the alleged incorrect listing of his name on the account. Moreover, the Debtor's sole possession and use of the account from 1999 through the present is further uncontroverted evidence that he is responsible for the account, if for no other reason that [sic] he was the only person using it. The Debtor cannot escape his liability for use of an account by merely claiming that he did not apply for it. At the very minimum, assuming the Debtor could prove that he did not sign an application for the account, the theory of *quantum meruit* would apply to make this

a valid debt of the Debtor. At this point, the burden of proof is on the Debtor to produce evidence “equivalent in probative value to that of the creditor to rebut the prima facie effect of the proof of claim.” *In re VTN, Inc.*, 69 B.R. 1005 (Bankr. S.D. Fla. 1987) citing *In re DeLorean Motor Co. Litigation*, 59 B.R. 329 (Bankr. E.D. Mich. 1986).

At the February 2, 2005 evidentiary hearing, the Affidavit of Debtor was introduced and admitted into evidence without objection, as were the subject credit card account statements from January 2001 through June 2004.

LEGAL STANDARDS

A proof of claim filed pursuant to 11 U.S.C. §501 is deemed allowed unless a party in interest objects. 11 U.S.C. 502(a). Rule 3001 of the Federal Rules of Bankruptcy Procedure, and the instructions contained in Official Form 10 for completing claim forms, dictate how a proof of claim should be filed. If the claim is one based upon a writing, FRBP 3001 imposes upon the claimant the requirement that the original or a duplicate of the writing be filed with the proof of claim; if the writing has been lost or destroyed, a statement of the circumstances of the loss or destruction should be filed with the claim instead. *See* 9 Collier on Bankruptcy ¶3001.01. Official Form 10 provides that a claimant “must attach to the proof of claim form copies of documents that show the Debtor owes the debt claimed...” *See First Nat’l Bank of Fayetteville v. Circle J. Dairy (Circle J. Dairy)*, 112 B.R. 297, 300 (W.D. Ark. 1989). Rule 3001(f) rewards the creditor for complying with the law. It states that a proof of claim executed and filed in accordance with the Federal Rules of Bankruptcy Procedure shall constitute *prima facie* evidence of the validity of the debt.

However, where an objecting party produces evidence to rebut the *prima facie* validity of

the debt, or if the claimant fails to comply with the requirements of FRBP 3001(c) to document its claim and an objection is filed on the grounds of insufficient documentation, then the burden shifts to the claimant to prove its claim by a preponderance of the evidence. The United States Supreme Court has cautioned courts to take care in considering claims, describing the claims determination process as “one of basic importance in the administration of the bankruptcy estate,” without which “unmeritorious or excessive claims might dilute the participation of legitimate claimants”. Gardner v. State of NJ, 329 U.S. 565, 67 S.Ct. 467, 91 L.Ed. 504 (1947).

ECAST’S CLAIM

In this case, eCAST filed a claim that did not identify any creditor or account number known by the Debtor. Debtor’s schedules reflected a disputed debt to Wachovia Bank for an account ending in 7155; the eCAST claim referenced an MBNA America Bank, N.A. account ending in 9068. In addition, the attachment to the original eCAST Claim contained no documentary support for its claim whatsoever. Indeed, although the claim is clearly one based upon a writing, a credit card agreement, eCAST failed to comply with FRBP 3001(c), by failing to attach any evidence of a written agreement with Debtor, such as an account application signed by Debtor or copy of any credit card agreement forming the basis of the Claim.

In its Amended Claim, eCAST asserted, for the first time, that its account number matched the Wachovia account number listed by the Debtor in his schedules. The Claimant attached a copy of a Wachovia credit card statement to the Amended Claim, but ultimately it could not support its allegation that the account was opened as a joint account with First Union in 1990. Claimant eCAST has produced no evidence, no records of MBNA or any other entity, to prove the account was opened as a joint account or that the Debtor obligated himself to the terms and conditions of any

credit card agreement. In addition, notwithstanding that the Wachovia credit card statement attached to the Amended Claim indicated the claim included interest and other charges in addition to the principal amount of the claim, eCAST failed to indicate it was seeking such amounts by failing to mark the appropriate box in section 4 of the Claim and Amended Claim, and failed to attach an itemized statement of all such interest and additional charges.

The Claimant eCAST stated in its Response, “[t]he fact that the actual account application is no longer available does not relieve the Debtor of the liability for the debt based on the evidence provided herewith.” However, this position ignores the fact that eCAST did not carry its burden in establishing the Debtor’s liability on the account. Although eCAST provided copies of credit card statements for the subject account and copies of some of Debtor’s canceled checks showing he made payments on the account, these documents do not persuade the Court the Debtor has any express liability for the whole of the debt listed.

While it is true the Debtor concedes that he used the account, the information reflected in the account statements indicates the Debtor made payments on the account exceeding the charges he made. Claimant eCAST has provided no evidence that the Debtor agreed to pay any interest, late fees, overlimit fees and other charges, failing to prove that Debtor has any liability on the subject account. Claimant’s position that “Debtor’s sole possession and use of the account from 1999 through the present is further uncontroverted evidence that he is responsible for the account, if for no other reason that [sic] he was the only person using it” and that “Debtor cannot escape his liability for use of an account by merely claiming that he did not apply for it” ignores the fact that Debtor more than paid for his utilization of the account. Absent some evidence that rebuts the Debtor’s testimony, set forth in the Affidavit of Debtor, that his wife opened the account prior to her

death, that he never signed any documents to open the account, and that he never signed any documents obligating himself on the account, eCAST has failed to establish that it has any right to collect interest, late fees, overlimit fees and other charges from the Debtor.

Finally, eCAST asserted that, at a minimum, assuming the Debtor could prove he did not sign an application for the account, the theory of *quantum meruit* would apply to make this a valid debt of the Debtor. Further, at the evidentiary hearing, eCAST posited that the “open account” and “account stated” theories of implied contracts supported its claim to recover funds from the Debtor on this account. These arguments are unavailing. Florida law bars suits that maintain quasi-contractual theories, such as *quantum meruit*, in the face of an express contract between the parties. See In re Managed Care Litigation, 298 F.Supp.2d 1259, 1298 (S.D.Fla. 2003) citing Harris v. Schikedanz Bros., 746 So.2d 1152, 1154 (Fla. 4th DCA 1999).

Thus, in conclusion, eCAST cannot recover from the Debtor based on an expressed contract theory because it has not rebutted the Debtor’s testimonial evidence that he did not enter into any expressed contract with eCAST, and it cannot recover from the Debtor based on an implied contract theory, because its position that an express agreement existed between the parties prohibits eCAST from relying on an implied contract theory. Accordingly, it is

ORDERED AND ADJUDGED that the Debtor’s Amended and Renewed Objection to Claim #11 is SUSTAINED and Claim #11 of eCAST Settlement Corporation is STRICKEN and DISALLOWED in its entirety.

DONE AND ORDERED in Chambers at Miami, Florida, this 4th day of May, 2005.

A. JAY CRISTOL, JUDGE
UNITED STATES BANKRUPTCY COURT

Copies furnished to:

James Schwitalla, Esq.
Martin Sandler, Esq.
Nancy Herkert, Trustee